Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-644

LEE KLINGER VOLKSWAGEN, INC.,
Petitioner,

vs.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION, CHRYSLER CREDIT CORPORATION, CHRYSLER REALTY CORPORATION AND EVANSTON DODGE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

TABLE OF CASES.

STATUTES.

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Petitioner, Lee Klinger Volkswagen, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on July 20, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at ...... F. 2d ...... (1978), 1978-2 Trade Cases ¶ 62,150. The oral opinion of the District Court for the Northern District of Illinois, Eastern Division, is unreported. Both opinions are appended hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 20, 1978. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether, as a matter of law, a court may preclude a jury from finding that the nine-year ($750,000), loss-subsidized operation of a nearby Chrysler factory-owned automobile dealership which resulted in the direct elimination of plaintiff's privately-owned Dodge dealership, constitutes an unreasonable restraint of trade, absent further evidence of a specific intent by defendants to drive plaintiff out of business, or cause plaintiff to operate at a loss.

2. Whether in a Section 1 case in order to demonstrate an unreasonable restraint on intrabrand competition through its elimination as a dealer, plaintiff must define and offer proof of a relevant geographic market.

STATUTES INVOLVED.

The statutory provisions involved are Section 1 of the Sherman Act, 15 U. S. C. §1, and Section 4 of the Clayton Act, 15 U. S. C. § 15. The foregoing statutes are printed in Appendix B.

STATEMENT OF THE CASE.

This is a Section 1 Sherman Act case. In a jury trial the District Court directed a verdict for defendants at the close of plaintiff's case. The Court of Appeals for the Seventh Circuit affirmed.

Plaintiff, Klinger Dodge, is a former independent Dodge dealer.* Evanston Dodge was a Dodge factory dealership, wholly owned by Chrysler.

Klinger Dodge and Evanston Dodge initially were located 3.5 miles apart. After relocation of Evanston Dodge in 1967, the two agencies were only 1.8 miles apart. There was evidence that the customer market was substantially located within a five to ten mile radius of a dealer point. Forty percent of Evanston Dodge's customers came from Klinger's Rogers Park sales area. It was conceded that both Klinger Dodge and Evanston Dodge substantially drew their customers from the same overlapping market and, as a consequence, were in head-to-head competition (Tr. 51, PX 68).

In the nine-year period (1963-1971) of its operation, Evanston Dodge lost money every year. Total losses were over $750,000. These losses were subsidized and underwritten by $790,000 in capital contributions and loans from Chrysler. During the same period Klinger Dodge was marginally profitable, losing $15,000 the year after Evanston Dodge relocated and, averaging a profit of only $11,000 for the entire period (PX 117).

Evanston Dodge consistently undercut Klinger's new car selling prices. Evanston Dodge's new car mark-ups ranged from $50.00 to $90.00 below those of Klinger. At the same time Evanston Dodge outspent Klinger in advertising four to one. A Chrysler official conceded Evanston's advertising expenditures, which were as much as $200.00 for each new car sale, were "excessive" and "a lot of money to spend on advertising" (PX 32, 34, 35; Tr. 108).

Klinger repeatedly complained to Chrysler officials and finally informed them that he would be forced to resign his agency if the loss operations of Evanston Dodge continued. These officials stated they had no intention of closing the Evanston agency (Tr. 420-4, 467).

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* Klinger Dodge changed its name to Lee Klinger Volkswagen, Inc.

In August, 1971, Klinger resigned his agency. Klinger Dodge was replaced by a factory controlled dealer, Colonial Dodge, at the same location. Six months later, Chrysler closed Evanston Dodge. Thereafter, Colonial Dodge operated at an annual profit of in excess of $100,000. Plaintiff's damage proof was based on Colonial's operating profits when free of the loss-subsidized operation of Evanston Dodge (PX 106).

Plaintiff did not challenge the legality of dual distribution or Chrysler's Dealer Enterprise plan itself. Rather it was plaintiff's theory that the loss-subsidized operation of Evanston Dodge was in disregard of profitability, resulting in the eventual elimination of plaintiff's independent dealership; and that this conduct, agreed to and made possible by Chrysler, was undertaken with knowledge of its probable consequences.

As further evidence of Chrysler's disregard of retail profitability, plaintiff offered proof that the only manager, Joe Lohr, who operated Evanston Dodge at a profit, was terminated in 1969. The reason given for termination was not lack of profitability, but insufficient volume or failure to produce the "numbers". Lohr was ordered to "reduce your gross and sell more automobiles". When he refused, he was terminated. At the same time Lohr's offer to purchase the Evanston Dodge agency was turned down by Chrysler. Thereafter, Evanston Dodge sustained annual six-figure losses until closing (Tr. 275-283).

The Court of Appeals affirmed the directed verdict for defendants on the grounds that the loss-subsidized operation of Evanston Dodge could not be found to have unreasonably restrained trade in violation of Section 1 in absence of proof that defendants specifically intended to drive plaintiff out of business, or, alternatively, caused it to operate at a loss. As a further ground, the Court below held that in this type of Section 1 case, as a necessary element of proof, the plaintiff must define and prove a relevant geographic market and a significant reduction in competition in that market as a result of plaintiff's elimination as a dealer.

ARGUMENT.

I.

The Holding of the Court Below Is in Conflict with This Court's Decisions.

The holding of the Court below that plaintiff must prove that defendants specifically intended to injure plaintiff or drive it out of business conflicts with this Court's decision in *United States* v. *U. S. Gypsum Co.*, ... U. S. ...., 1978-1 Trade Cases, ¶ 62, 103 (1978). There this Court, while holding that intent was a necessary element in a criminal antitrust case, rejected the notion that intent requires "a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects". Instead the Court held "[I]t is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow", or "with knowledge of its probable consequences". Here, a jury could have found that the loss operation of Evanston Dodge in a head-to-head competition with Klinger's agency was undertaken and continued with knowledge that the likely consequences would be plaintiff's elimination as a dealer. Indeed, Klinger repeatedly advised defendants precisely to that effect. Both the District Court and Court of Appeals summarized plaintiff's position as "that the defendants collectively joined in concerted conduct in operating Evanston Dodge at a subsidized loss, knowing that it would adversely affect Klinger." Moreover, in a civil action it is only necessary that the jury find that the challenged conduct was anticompetitive in either purpose *or effect*. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).*

* The Court of Appeals' comment that "Plaintiff concedes that the defendants had no intent to injure plaintiff" misstates the record. In opposing the directed verdict motion, plaintiff's counsel acknowledged that the nationwide Chrysler Dealer Enterprise plan was not

(Footnote continued on next page.)

Nor was it necessary that plaintiff demonstrate that the effect of defendants' conduct was to force it to operate at a loss, as distinguished from diminished profitability. The Court below acknowledged that the Ninth Circuit in *England* v. *Chrysler Corp.,* 493 F.2d 269 (9th Cir. 1974), *cert. denied* 419 U. S. 869, assumed that a manufacturers' "predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized retailer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade", but purported to distinguish that decision by observing "plaintiff here, however, was able to make a profit". This both mischaracterizes the record and applies an erroneous damage standard, contrary to the holding in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U. S. 100 (1969). Plaintiff actually lost $15,000 in the year following Evanston Dodge's relocation and was only marginally profitable during the entire period. Its president testified that but for the loss-subsidized operation of Evanston Dodge, Klinger Dodge would have enjoyed the $100,000 annual profits realized by its successor, Colonial Dodge, when free of Evanston Dodge's loss operations. The difference between Colonial's profits and the marginal profits realized by Klinger, coupled with Klinger's testimony, constituted proof of both the fact and amount of damage.

The same type of damage measure was approved in *Zenith,* where its president testified that but for the effects of the Canadian patent pool, Zenith would have enjoyed the same percentage of the Canadian market it enjoyed in the United States market. This Court held that such proof was competent to establish both the fact and amount of damage.

(Footnote continued from preceding page.)
conceived to run Klinger out of business. At the same time he pointed out that defendants were aware of the likely injurious consequences of Evanston Dodge's loss operations and that Klinger had informed Chrysler officials he would be forced to resign unless corrective action were taken.

Obviously, a jury could have found that the diminished or marginal profitability of the Klinger agency was the result of Evanston Dodge's loss operations and caused Klinger to resign his agency. Indeed, the Court below appears to concede that this presented a jury issue, stating "[The] sufficiency of the evidence to support finding (1), causation of plaintiff's withdrawal, presents a close question".

Finally, the Court of Appeals' alternative holding that plaintiff in this type of Section 1 case must prove, as a necessary element of its case, a relevant geographic market and show "the effect thereon of the surrender of Klinger", finds no support in the decisions of this Court or the statute itself, and is contrary to the admonition of this Court in *Radovich* v. *National Football League,* 352 U. S. 445 (1957), that courts should not "add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws". While market definition and shares may be relevant as a matter of defense in certain circumstances, they are not prerequisite to establishing a *prima facie* Section 1 case.* Section 1 of the Sherman Act is concerned with any undue restraint on the competitive process or competition in the market place. Under the "rule of reason", the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U. S. 36, 49 (1977). Elimination of a single competitor, no matter how small or insignificant, as a consequence of concerted conduct which is shown *prima facie* to be anticompetitive either in purpose or effect, is sufficient to raise a jury issue and require defendants to go forward with their defense. See *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U. S. 690 (1962), *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959). As observed by this Court in *Klor's,* at 213, elimination of a competitor "is not to be

* As to the need, however, for defining the relevant market in a Section 2 case, see *Mullis* v. *ARCO Petroleum Corporation,* 502 F. 2d 290, 295 n.14 (7th Cir. 1974).

tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

II.

The Holding of the Court Below Is in Conflict with Decisions of the Third and Ninth Circuits.

While variously stating the criteria for establishing a Section 1 violation in this type of case it is manifest that both the Ninth and Third Circuits*, on the facts in the instant case, would have allowed the case to go to the jury and affirmed the sufficiency of the evidence to support a verdict for plaintiff on the issue of liability. The Seventh Circuit's attempted distinction of those decisions concedes as much.

Thus, in *Coleman* and *Glauser,* the Third Circuit held that loss subsidization of company owned dealerships may result in an unreasonable restraint on competition where either the purpose or effect is to achieve forward vertical integration or to eliminate the independent dealer. Similarly, in *England,* the Ninth Circuit assumed, at 273, that operation of a factory-owned dealership at a loss and in disregard of retail profitability "and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade."

The holding of the Court below forecloses the jury from making such a determination of the anticompetitive purpose or effects of Evanston Dodge's loss-subsidized operation.

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* *Mt. Lebanon Motors, Inc.* v. *Chrysler Corporation,* 283 F. Supp. 453 (W. D. Pa. 1968); *Mt. Lebanon Motors, Inc.* v. *Chrysler Corporation,* 417 F. 2d 622 (3rd Cir. 1969); *England* v. *Chrysler Corp.,* 493 F. 2d 269 (9th Cir. 1974), *cert. denied* 419 U. S. 869; *Coleman Motor Co.* v. *Chrysler Corp.,* 525 F. 2d 1338 (3rd Cir. 1975); *Elfman Motors, Inc.* v. *Chrysler Corporation,* 1977-2 Trade Cases ¶ 61,650 (E. D. Pa. 1977); *Glauser Dodge Co.* v. *Chrysler Corporation,* 570 F. 2d 72 (3rd Cir. 1977). *Cf. Rea* v. *Ford Motor Co.,* 497 F. 2d 577 (3rd Cir. 1974), *cert. denied* 419 U. S. 868.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 75-2166

LEE KLINGER VOLKSWAGEN, INC.,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION, CHRYSLER MOTORS CORPORATION, CHRYSLER CREDIT CORPORATION, CHRYSLER REALTY CORPORATION and EVANSTON DODGE, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73-C-118—Prentice H. Marshall, *Judge.*

Argued April 21, 1976—Decided July 20, 1978

Before FAIRCHILD, *Chief Judge*, MARKEY, *Chief Judge of the United States Court of Customs and Patent Appeals**, and ROBERT A. GRANT, *Senior District Judge.***

FAIRCHILD, *Chief Judge*. On this appeal, the court is asked to consider the sufficiency of evidence of anticompetitive effect, in a specific instance, of Chrysler Motor Corporation's dual system of automobile distribution. Challenges to the system, brought under § 1 of the Sherman Act, have been dealt with in

* Chief Judge Howard T. Markey of the United States Court of Customs and Patent Appeals is sitting by designation.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

a number of cases,[1] and the background of the Chrysler dual system of distribution has been described in those opinions.

Plaintiff Lee Klinger Volkswagen, Inc. was formerly Lee Klinger Dodge, Inc., and was then an independent Dodge dealer. Klinger sued Chrysler Corporation, Chrysler Motor Corporation, Chrysler Credit Corporation, Chrysler Realty Corporation and Evanston Dodge, Inc. Evanston Dodge is a wholly-owned subsidiary of Chrysler, and formerly operated a company dealership. The complaint charged defendants with engaging in a combination and conspiracy unreasonably to restrain trade in the distribution of new Dodge cars.

At the close of plaintiff's case, the district court directed a verdict in favor of defendants. The court summarized plaintiff's position as "that the defendants collectively joined in concerted conduct in operating Evanston Dodge at a subsidized loss knowing that it would adversely affect Klinger," and such conduct violated § 1 of the Sherman Act. The court noted that plaintiff made no claim that defendant intended to injure plaintiff. The court concluded "that the evidence adduced does not and could not sustain a jury verdict in favor of the plaintiff on a section 1 theory."

We agree with the decision of the district court, and accordingly, AFFIRM.

I

Lee Klinger Dodge, Inc. formerly held a Dodge franchise and began operating in 1955 at 2525 West Touhy Avenue on Chicago's far north side. In 1966, at Chrysler's suggestion,

1. *Mt. Lebanon Motors, Inc.* v. *Chrysler Corporation*, 283 F. Supp. 453 (W. D. Pa. 1968); *Mt Lebanon Motors, Inc.* v. *Chrysler Corporation*, 417 F. 2d 622 (3rd Cir. 1969); *England* v. *Chrysler Corp.*, 493 F. 2d 269 (9th Cir. 1974), *cert. denied* 419 U. S. 869; *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975); *Elfman Motors, Inc.* v. *Chrysler Corporation*, ... F. Supp. .... (E. D. Pa. 1977); *Glauser Dodge Co.* v. *Chrysler Corporation*, ... F. 2d .... (3rd Cir. 1977). *Cf. Rea* v. *Ford Motor Co.*, 497 F. 2d 577 (3rd Cir. 1974), *cert. denied* 419 U. S. 868.

Klinger moved several blocks southeast to 6600 North Western Avenue.

Evanston Dodge, Inc. was successor to Winfield Dodge, a dealer enterprise operation begun in 1962 in the northeastern Chicago suburb of Winnetka. In 1963, the dealership was moved to Evanston, another northeastern suburb, in which Chrysler was eager to have representation. George Moore, Chicago Metropolitan Branch Manager for the Marketing Investment Division of Chrysler Motors Corporation,[2] when questioned by plaintiff's counsel, explained that so eager was Chrysler to enter the Evanston market, that it moved into the first available facility, located at 1810 Ridge Avenue, though it was not really adequate. In 1963, Evanston Dodge at Ridge Avenue was approximately 3.5 miles from Klinger Dodge at Touhy Avenue. In 1967, Chrysler relocated Evanston Dodge from Ridge Avenue to 111 Chicago Avenue. This was in the automobile "dealer cluster" in Evanston[3] where Chrysler deemed it particularly important to have representation to compete adequately against Ford and General Motors. Evanston Dodge at Chicago Avenue was only a few hundred feet north of the Chicago boundary and thus, only 1.8 miles from Klinger Dodge at North Western Avenue.

In the nine years of its operation, Evanston Dodge had twelve different presidents. It is unclear how many were investor-dealers, but it is clear that none ran a profitable operation. Between 1963 and 1972, Evanston Dodge lost over $750,000. Continued operation was possible only because these losses were subsidized and underwritten by $790,000 in capital contributions and loans from Chrysler.

Golf-View Dodge, a dealer enterprise operation located in Morton Grove, another near-north suburb of Chicago, could also be considered in the same general marketing area as Klinger

2. The Marketing Investment Division of Chrysler Motors conducts the Corporation's dealer enterprise program.

3. Ten automobile dealerships are located on Chicago Avenue in Evanston.

Dodge and Evanston Dodge. It sustained losses of over $300,000 in the four years, 1968 through 1971. Continued operation was possible only because these losses were subsidized by Chrysler.

Dealer enterprise stores in the Chicago metropolitan area,[4] in the aggregate, sustained losses of approximately $1,000,000 a year in 1970 and 1971. Chrysler subsidized these losses.

Mr. Klinger complained to Chrysler officials that the price cutting and subsidized operation of dealer enterprise establishments, particularly of Evanston Dodge, were adversely affecing his dealership, making it impossible for him to receive the return on investment he anticipated. At trial, plaintiff sought to highlight the adverse effect by pointing to differences in pricing and advertising between the two dealerships that gave Evanston Dodge an advantage it could not have enjoyed but for Chrysler's underwriting the resultant operational losses. On new automobiles, Evanston Dodge almost consistently underpriced Klinger Dodge: in 1965, by $78 per car; in 1966, by $63; in 1967, by $9; in 1968, by $56; in 1969, by $88; in 1970, by $51. Only in 1971 did Klinger offer new cars at prices lower than Evanston Dodge.[5] On used cars, however, Klinger almost always underpriced Evanston Dodge; in 1967, by $5 per car; in 1968, by $6; in 1970, by $9; in 1971, by $40. Only in 1969 did Evanston underprice Klinger, and then by $33 per car. With respect to advertising, Evanston repeatedly outspent Klinger, on occasion budgeting twice as much as Klinger for this purpose.

Though Mr. Klinger complains that he was driven out of business by Chrysler's loss-subsidized operation of Evanston

4. Chrysler considers the Chicago metropolitan area to include Lake County, Indiana and Cook, Lake and DuPage Counties, Illinois as well as a portion of Kane County, Illinois.

5. 1971 was the last year of operation for Klinger Dodge and plaintiff, therefore, claims that it cut its prices to get rid of its inventory. In 1971, Klinger underpriced Evanston Dodge by $71 per car.

Dodge and other competing dealer enterprises, Klinger personally drew a salary and his wholly-owned corporation did not lose money as a Dodge dealer.

In the years from 1963 through 1970, his salary ranged from $15,692 to $36,083, net profit from $1,881 to $18,731, and the total of the two from $23,692 to $54,814. For the first half of 1971, just before termination, and for various reasons not a truly representative period, Klinger's salary was $12,916, net profit $44,526, and the total $57,442.

By 1970, Mr. Klinger had begun to explore the possibility of abandoning the Dodge line and of becoming a Volkswagen dealer. In 1971 he and the Corporation resigned the Dodge dealership and he invested $275,000 in a Volkswagen franchise. In negotiations Volkswagen had projected first year earnings at $140,000. The parties did not anticipate, however, the tariff of $200-$300 per item soon placed on imports. This and other problems attendant on opening a new dealership produced a first year loss of $130,000.

The former Klinger Dodge location was taken over by Chrysler and converted to a dealer enterprise operation under the name Colonial Dodge. Evanston Dodge was closed in 1972. In that year Colonial Dodge showed a profit of approximately $100,000 and the same profit was recorded for 1973. On November 8, 1973, the successful investor-dealer of Colonial Dodge bought out Chrysler's interest in the enterprise and established an independent franchise.

Plaintiff showed the proximity of the Klinger and Evanston Dodge locations, and that many customers of both came from the same neighboring area. It argues that these facts are sufficient to show damage to competition as a result of the departure of plaintiff. Concededly it did not offer proof to identify the market affected by Chrysler's challenged continued subsidy of losses, nor the percentage of the relevant market affected thereby.

The record does show, however, that there were some 25 to 30 independent Dodge dealerships in the Chicago metropolitan area at the time of trial, and that seven had been developed from dealer enterprise operations. By the time of trial, moreover, both Golf-View Dodge and Colonial Dodge were operating as privately-owned francises, Chrysler's interest having been purchased by the investor-dealer.

II

Plaintiff bases its claim exclusively on § 1 of the Sherman Act. Originally, it had complained of a § 2 violation, but this claim was abandoned. At no time did plaintiff allege a violation of the Robinson-Patman Act or the Automobile Dealer's Day in Court Act.

Plaintiff concedes that the continued operation of a distributor-subsidiary at a loss, made possible by a manufacturer-parent's grant of subsidy, is not a *per se* combination in restraint of trade. The gist of its claim is that the continued operation of Evanston Dodge at a loss, condoned and subsidized by Chrysler, has sufficiently been shown to have forced a competitor to cease competition so that it could be found by the jury to be a combination or conspiracy in unresonable restraint of trade.

Plaintiff concedes that the defendants had no intent to injure plaintiff. Thus we are not concerned with predatory price-cutting for the purpose of eliminating competition.

Plaintiff relies on language in the decisions dealing with intra-band competition indicating that pricing by distributors controlled by the manufacturer, if low enough to be reckless of profitable operation, may constitute unreasonable restraint of trade if competitors are thereby forced out of the field. In *England, supra,* note 1, at page 273, the Ninth Circuit *assumed* that a manufacturer's "predominant emphasis on market penetration, which results in the deliberately reckless operation of a subsidized retailer and which has the inevitable effect of forcing

competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade." Plaintiff here, however, was always able to make a profit.

In *Coleman, supra,* note 1, at page 1345, the Third Circuit said "although the evidence is weak, the jury could have found further that Chrysler's actions were unfairly competitive and that their effect was to force plaintiff out of business." In a footnote the Court commented "We are here concerned with effect not intent . . . ." The Court made plain, in showing that plaintiff had been forced out of business, that plaintiff suffered several years of losses before its demise. Again, plaintiff Klinger was always able to make a profit.

In *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.,* 570 F. 2d 72 (3rd Cir. 1977) the Third Circuit commented upon and explained *Coleman,* summing up, "The rejection in *Coleman* of Chrysler's contention that it was entitled to a judgment *n.o.v.* rather than a new trial is no more than a holding that on the record in that case a jury could have found a purpose or operative effect of forward vertical integration by the elimination of independent dealers in the geographic and product market there considered." 570 F. 2d at 84. In *Glauser,* the Court held that on the record before it, judgment *n.o.v.* should have been granted and reversed a judgment for the plaintiff. "The fact that the source of the subsidy is the manufacturer itself, we conclude, does not under a rule of reason analysis of the facts bring this case within the reach of § 1 of the Sherman Act . . . Absent forward vertical integration whose purpose or actual operation is to concentrate Dodge sales in the hands of the Chrysler-owned dealers, the subsidies have a pro-competitive effect, at both the intrabrand and the interbrand levels." 570 F. 2d at 86.

Plaintiff Klinger would argue that even absent a purpose to injure plaintiff, the evidence in the case before us would support jury findings that (1) defendant's conduct caused plaintiff, though a reasonably efficient operator, to cease business as a

Dodge dealer, and (2) plaintiff's surrender significantly reduced competition for sales of Dodge automobiles.

Sufficiency of the evidence to support finding (1), causation of plaintiff's withdrawal, presents a close question. Defendants argue that the anticipation of very high profits in a new endeavor was the real cause. Klinger had undoubtedly made less money as a Dodge dealer than he would have liked, but plaintiff never had a loss year, and there was no evidence tending to show objectively that Klinger's personal salary plus corporate profits was unreasonably low compensation for his efforts plus return on his investment.

We conclude in any event that in order to reach finding (2) there must be proof identifying the relevant market and showing the effect thereon of the surrender of Klinger. We observe that this type of inquiry was pursued in both *Coleman* (albeit a monopolization claim was present) and in *Glauser*. In *Glauser*, moreover, the Court referred specifically to identification of relevant product and geographic markets as a necessary element of proof in this type of § 1 case. 570 F. 2d at 81.

Presumably just after Klinger's withdrawal there was one fewer independent Dodge dealers than just before, but we think that in looking for and evaluating anticompetitive effects in order to determine whether there was an unreasonable restraint of trade, changes in the situation evolving over a reasonable interval must also be considered.[6] Although plaintiff did not attempt to pursue the relevant market inquiry, the record does show that by the time of trial in October, 1975, Evanston Dodge had been terminated and the Chrysler-controlled dealer which replaced plaintiff had become independent, as had one other Chrysler-controlled dealer in the general area.

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6. As already noted, plaintiff concedes that the challenged conduct is not a *per se* violation of § 1. Accordingly, the "rule of reason" applies. There must be evidence sufficient to show that "the effect upon competition in the marketplace is substantially adverse." *U. S.* v. *Arnold Schwinn & Co.*, 388 U. S. 365, 374 (1967); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36 (1977).

We think that a jury verdict, that the low-priced sales by Evanston Dodge, agreed to and made possible by Chrysler, had such a destructive effect on competition in the relevant Dodge market that it was an unreasonable restraint of trade, could not stand.

Accordingly, the judgment appealed from is AFFIRMED.

A true Copy:

Teste:

....

Clerk of the United States Court of Appeals for the Seventh Circuit

OPINION OF DISTRICT COURT.

The Court: I'm sorry I kept you waiting like this.

I have got a couple of comments to make. I won't keep you long.

As I understand the pleadings, the briefs, Mr. McConnell's argument yesterday, and so forth, the presentation to date, the total presentation to date, this, obviously, was not a Dealers-Day-in-Court case; it is not a Robinson-Patman claim, either pleaded or argued for either price discrimination or discriminatory advertising allowances, and so forth; Mr. McConnell has withdrawn any Section 2 Sherman Act claim, although Section 2 is cited in the complaint; it is not a common law unfair competition claim.

As I understand the plaintiff's theory, through his counsel, or through the corporation's counsel, they assert that the defendants collectively joined in concerted conduct in operating Evanston Dodge at a subsidized loss knowing that it would adversely affect Klinger, to violate Section 1 of the Sherman Act, which prohibits agreements, combinations and conspiracies in unreasonable restraint of trade.

As I heard Mr. McConnell's argument yesterday, there is no assertion made that the defendants intentionally inflicted injury upon the plaintiffs.

The plaintiffs assert in their pretrial submission that the issues of—let me find them—of fact—I have found them—that the principal issue of fact is whether Chrysler Motors Corporation knew that the subsidized loss competition would adversely affect Klinger, and their question of law is whether defendants' loss-subsidized operation of the factory and dealer enterprise store in competition with the plaintiffs violates Section 1 of the Sherman Act.

I do not profess to be an antitrust expert. I doubt that I ever will be, although I am learning. I have reviewed the cases, I have reviewed the text, I read your briefs, I read particularly the auto dealership cases submitted to me, and it is my firm conviction, Mr. McConnell, that the evidence adduced does not and could not sustain a jury verdict in favor of the plaintiff on a Section 1 theory.

APPENDIX B.

STATUTES INVOLVED.

The statutes involved are:

1. Section 1 of the Sherman Act, 15 U. S. C. § 1, which provides:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 4 of the Clayton Act, 15 U. S. C. § 15, which provides:

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.